

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

UNITED STATES OF AMERICA
ex rel. **DANIEL MONTES, JR. and**
ELIZABETH H. HUDSON,

Plaintiffs-Relators,

V.

**MAIN BUILDING MAINTENANCE,
INC., JXM, INC., ROBERT A.
XIMENES, ELVIRA H. XIMENES,
and MARGAUX I. XIMENES,**

Defendants.

CIVIL ACTION NO. 5:16-CV-00523-JKP

DEFENDANTS' REPLY TO UNITED STATES' STATEMENT OF INTEREST

TO THE HONORABLE COURT:

Defendants Main Building Maintenance, Inc., JXM, Inc., Robert A. Ximenes, Elvira H. Ximenes, and Margaux I. Ximenes (collectively, “**Defendants**”) file this Reply to the *Statement of Interest* by the United States as to *Defendants’ Motion for Judgment on the Pleadings* (the “**Motion**”) and would respectfully show the following:

1. The United States submitted their Statement of Interest addressing, among other things, what it characterizes as “certain overly broad and erroneous contentions” by Defendants in the Motion and corresponding reply brief concerning the application of the False Claims Act, 31 U.S.C. § 3729 *et seq.* (the “**FCA**”) to claims based on Small Business Administration (“**SBA**”) program eligibility. *See* ECF No. 64 pg. 1.¹

1 Importantly, the United States took no position as to whether Plaintiffs adequately pleaded their claims or
as to the merits of the Defendants' Motion.

2. Defendants file this reply to make abundantly clear that they fully recognize that federal case law does not impose a categorical rule barring FCA claimants from seeking redress for fraud relating to participation in SBA programs. *See* ECF No. 64 pg. 9. In fact, Defendants have delineated and explained the “false certification” and “fraudulent inducement” sub-types of FCA claims potentially at issue here in their own briefing. *See* ECF No. 63 pgs. 3-4. Defendants further acknowledge that, while *Guzder I* appears to foreclose Relators’ claims based on a false certification theory, a subsequent opinion issued by the *Guzder I* court, *United States ex rel. Guzder v. MKM Engineers, Inc.*, No. H-05-895, 2009 WL 10697658 (S.D. Tex. May 1, 2009) (“*Guzder II*”), recognizes the potential application of the fraudulent inducement theory. *See* ECF No. 63 pgs. 2, 5.

3. That said, Defendants argue through the prior reply to the Motion that Relators have simply failed to properly plead fraudulent inducement as the theory of their case under *Guzder II*. *See id.* pg. 5. Relators instead conflate the two FCA theories in their Original Complaint, and it is only in their Opposition to the Motion where they specifically invoke the theory of fraudulent inducement. Any misunderstanding stems from Relators’ own obfuscation of their theory of recovery, which, in turn, supports the argument that Relators have failed to plead their fraud-type claims with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure.

4. To be clear, Defendants recognize that the “false certification” and “fraudulent inducement” theories are cognizable under the FCA. The basis for Defendants’ Motion is that Plaintiffs have not pled either one properly. Defendants’ Motion argued that based on the *face of the Original Complaint* Plaintiffs did not assert a “fraudulent inducement” theory (*not* that such a theory does not exist). Leaving the “fraudulent certification” as the only plausible theory

to support the *Complaint*, Defendants' Motion (and Reply) explains why Plaintiffs failed to properly plead that theory as well (*not* that such a theory does not exist).

5. Accordingly, Defendants pray that the Court take notice of this Reply, grant their Motion, and dismiss the Original Complaint with prejudice.

DATED: February 27, 2020.

Respectfully submitted,

SHAW LAW PLLC

By: Ronald J. Shaw

Ronald J. Shaw
State Bar No. 18152300
Email: attorney@shawlawpllc.com
5150 Broadway, Unit 619
San Antonio, Texas 78209
Tel: (210) 227-3737
Fax: (210) 366-0805

*Counsel for Defendants Main Building
Maintenance, Inc., Elvira H. Ximenes,
and Robert A. Ximenes*

DAVIS & SANTOS, P.C.

By: /s/ Caroline Newman Small

Jason M. Davis
State Bar No. 00793592
Email: jdavis@dslawpc.com
Jay Hulings
State Bar No. 24104573
Email: jhulings@dslawpc.com
Caroline Newman Small
State Bar No. 24056037
Email: csmall@dslawpc.com
719 S. Flores Street
San Antonio, Texas 78204
Tel: (210) 853-5582
Fax: (210) 200-8395

*Counsel for Defendants JXM, Inc. and
Margaux I. Ximenes*

CERTIFICATE OF SERVICE

I hereby certified that on February 27, 2020, a true and correct copy of the foregoing document was served on counsel of record and the parties below as follows:

Charles S. Siegel	_____	Regular Mail
Caitlyn E. Silhan	_____	Certified Mail/RRR
WATERS & KRAUS, LLP	<u> X </u>	CM/ECF
3219 McKinney Avenue	_____	E-mail
Dallas, Texas 75204		
Tel: (214) 357-6244		
Fax: (214) 871-2263		
E-mail: siegel@waterskraus.com		
E-mail: csilhan@waterskraus.com		

Thomas M. Greene	_____	Regular Mail
Michael Tabb	_____	Certified Mail/RRR
Ryan P. Morrison	<u> X </u>	CM/ECF
Tucker D. Greene	_____	E-mail
GREENE LLP		
One Liberty Square, Suite 1200		
Boston, Massachusetts 02109		
Tel: (617) 261-0040		
Fax: (617) 507-6559		
E-mail: tgreene@greenellp.com		
E-mail: matabb@greenellp.com		
E-mail: rmorrison@greenellp.com		
E-mail: tucker.greene@greenellp.com		

***Attorneys for Plaintiff-Relators Daniel
Montes Jr. and Elizabeth H. Hudson***

John Deck	_____	Regular Mail
ASSISTANT UNITED STATES ATTORNEY	_____	Certified Mail/RRR
601 N.W. Loop 410, Suite 600	<u> X </u>	CM/ECF
San Antonio, Texas 78216	_____	E-mail
Tel: (210) 384-7388		
Fax: (210) 384-7322		
E-mail: john.deck@usdoj.gov		

Counsel for the United States of America

/s/ Caroline Newman Small
Caroline Newman Small